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## Lawyers and the Practice of Law in England: An American Visitor's Observations

Arthur E. Wilmarth Jr.

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# Lawyers and the Practice of Law in England: An American Visitor's Observations

## Introduction

Last year, under the auspices of the American Bar Association's International Legal Exchange Program, Arthur E. Wilmarth, Jr. left his Washington, D.C. law firm to work for seven months in London with a firm of English solicitors. While in London he worked on a variety of corporate, commercial and litigation matters. Mr. Wilmarth's experience within the English legal system has influenced his views on the practice of law in the United States, and he will treat certain English legal practices and approaches which he believed are pertinent to current developments within the American Bar.

In this issue Mr. Wilmarth writes of the English legal profession as an institution. In the winter issue, Mr. Wilmarth will review the rules governing discovery and the recovery of counsel fees in England and will contrast those rules with American federal practice. In the spring issue, he will give his views on the current debate in England concerning the adoption of a written Bill of Rights.

The views expressed are entirely Mr. Wilmarth's, and we hope they will spark some lively exchanges with our readers.

F.S.R.

## I. The English Legal Profession

Thanks to Agatha Christie and J. Arthur Rank, Americans know something about barristers and solicitors, but relatively few Americans appreciate the significant differences between the unified American legal profession and its divided English counterpart. In fact, the English legal profession has a number of singular features which are interesting and relevant to discussions on educational and structural reforms of the American Bar. Accordingly, this article will consider the value of adapting some of these English approaches to the American context.

The most distinctive feature of the English legal profession is, of course, the division between barristers and solicitors. Barristers appear before the "Bar" of justice, hence their name. They are associated with one of four Inns of Court (Lincoln's, Inner Temple, Middle Temple and Gray's), which date

from the fourteenth century. While the national organization of solicitors, the Law Society, did not receive a Royal Charter until 1831, solicitors can trace their profession back to the sixteenth century.<sup>1</sup> Out of a total of 6,800 barristers, 3,800 practice actively. There are 30,000 active solicitors.

One may not practice simultaneously as a barrister and solicitor. The barrister is an advocate in the higher courts, a specialist, and, quite literally, a "lawyer's lawyer," because usually he can be retained only by a solicitor. The solicitor, on the other hand, is retained directly by the client to act as a general advisor. While solicitors do specialize, partnerships (firms of solicitors) preserve the general advisory nature of their work. Barristers, on the other hand, cannot form partnerships or firms although they can share "chambers."

Unlike the solicitor, the barrister has no contractual relationship with the person he represents and cannot sue for a fee. The barrister's fee is theoretically an honorarium which the solicitor retaining him has an ethical duty to pay, even if the solicitor is not paid by his own client.

In general terms, the solicitor conducts the day-to-day communications with the client, informs the barrister of the client's desires and, in litigated matters, takes discovery, interviews and prepares witnesses (the barrister is permitted to interview only the client and expert witnesses before trial) and advises the barrister on the facts. The barrister gives specialized advice or, in litigated cases, drafts the pleadings, plans litigation strategy and acts as courtroom advocate. This division of responsibility frees the barrister to acquire special knowledge in a particular field of law and to concentrate on the demands of advocacy.

While the barrister and the solicitor receive different training, each must apprentice himself prior to qualification. A solicitor must usually have a university degree, pass the qualifying examinations, and serve a two-year period of "articles" with a practicing solicitor. A barrister must normally have a university degree and, if his degree is in a field other than law, a one-year Diploma in Law. In addition to passing the Bar examinations, the would-be barrister must join an Inn of Court, attend a required number of dinners at his Inn and take part in other traditional activities. He must also serve a year's "pupillage" with a practicing barrister after completing his examinations.

Most English lawyers find the required apprenticeship extremely valuable, and if long-term practical experience before admission to practice is beneficial in England, why not in the United States? The English experience suggests that our law schools should seriously consider replacing the third aca-

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<sup>1</sup>For general discussions of the history and present roles of barristers and solicitors, see Webster, *The Bar of England and Wales: Past, Present and Future*, in *LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED* 84-108 (H. Jones ed. 1977); Bowron, *Solicitors and the Law Society*, *id.* at 109-124; Memoranda No. 1 and No. 3 submitted by the Council of the Law Society to the Royal Commission on Legal Services (1976-1977); and J. Baker, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 65-77 (1971).

demical year with a year of practical internship, perhaps along the lines of Chief Justice Burger's recommendation of a year's internship for prospective advocates.<sup>2</sup>

In assessing the educational program for English lawyers one must consider the shortcomings as well as the virtues of its emphasis on practical training. One problem, for example, is that prospective barristers find it difficult to support themselves during their practical training. The Inns give some limited scholarships and pupils may earn fees during the last six months of their pupillage, but barristers do not pay a salary to their pupils who have, after all, completed their academic requirements. This has left barristers open to charges of favoring those applicants who have social standing and independent means. In contrast, solicitors normally do pay articled clerks a subsistence salary and are encouraged by the Law Society to pay clerks an "adequate wage" so that "no one is lost to the profession because of the cost of qualifying."<sup>3</sup> All this would suggest that if practical training is to become part of American legal education, the American Bar must ensure that law students receive adequate financial support during that training.

The division of the English legal profession between barristers and solicitors has understandably led to certain tensions. Despite a declaration by the Bar and the Law Society in November 1975 that the two branches were equal and that their work should be conducted on that basis, some solicitors still complain that certain barristers behave as if they belonged to the "superior branch" of the profession.<sup>4</sup> Additionally, solicitors have requested greater rights of audience in criminal courts (they may now appear only for limited purposes), and in the High Court of Justice (for example, to appear on certain uncontested motions and to advise the court of agreed terms of settlement between the parties). The barristers have opposed this request. Solicitors also consider the complete separation of qualifying programs for barristers and solicitors to be unsatisfactory and unnecessarily rigid since it compels the prospective English lawyer to choose one career or the other before he begins his professional training. Moreover, solicitors criticize the fact that most judges are drawn from the Bar.<sup>5</sup>

Nonetheless, most barristers and solicitors do not desire a fused profession because they believe the advantages of the split profession outweigh its shortcomings. Most English lawyers contend that the divided profession leads to the most efficient allocation of work and enables barristers to develop greater expertise in advocacy. Another reason given for not merging the profession is that fusion might place the leading barristers in the larger firms of solicitors,

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<sup>2</sup>Remarks by the Chief Justice of the Supreme Court of the United States to the American Law Institute (May 15, 1978), reprinted in 9 ALI-ABA CLE REVIEW, Nos. 27 and 28 (June 30 and July 7, 1978).

<sup>3</sup>Memorandum No. 3, pt. 2, submitted by the Council of the Law Society to the Royal Commission on Legal Services (1977), answer X.16 [hereinafter cited as Memorandum].

<sup>4</sup>Memorandum, *supra* note 3, at answer III.2.9.

<sup>5</sup>Memorandum, *supra* note 3, at answers I.21, and II.2.2.

leaving smaller firms or individual solicitors without access to the best advocates.<sup>6</sup> American lawyers might question this concern, because a considerable number of small litigation firms with highly skilled advocates have flourished within the unified American profession.

Given the history of a unified legal profession in the United States, the creation of a strict division between advocates and nonadvocates or separate training schemes seems neither likely nor desirable. American lawyers have long been accustomed to flexibility in their choice of practice and to equality of status with their colleagues. They would surely oppose the establishment of separate qualifying programs which would restrict their practice opportunities, and nonadvocates would certainly resent any attempt by advocates to establish themselves as the more prestigious branch of the legal profession.

Nonetheless, the English model provides persuasive support for the proposals of Chief Justice Burger and the Devitt Committee to train advocates through a combination of law school clinical courses, practical internships during the third year of legal study, continuing legal education courses after law school, and postgraduate work with trial attorneys.<sup>7</sup> Such programs should, however, be flexible, so that a law student or lawyer may qualify as an advocate at any point during his career and so that a qualified advocate is not precluded from the general practice of law.

While reform in the training of American advocates is needed, no such reform will be truly effective unless American litigators change their priorities. American trial lawyers too frequently emphasize technique, strategy, and "winning" while ignoring whether their practices result in the fair and ethical resolution of disputes and the avoidance of frivolous lawsuits. In contrast, English advocates seem to adhere to a higher standard which places professional ethics and the public interest above their clients' demands. A recent English decision described the advocate's responsibilities as follows:

[E]very counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his posses-

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<sup>6</sup>Memorandum, *supra* note 3, at answers 1.21.13, and III.2; Webster, *supra* note 1, at 96-100; Williams, *Fusion: An Outsider's View*, 74 *GUARDIAN GAZETTE* No. 12 (1977). [Author's Note: Mr. Williams practiced for 13 years as a barrister and solicitor in Winnipeg, Canada, before qualifying to practice as a solicitor in England.]

<sup>7</sup>See Devitt Committee, Report and Tentative Recommendations on the Standard for Admission to Practice in the Federal Courts to the Judicial Conference of the United States, 79 *F.R.D.* 187 (1978). Judge Devitt has stated that his Committee has *not* proposed either a divided legal profession or completely separate training programs for advocates and nonadvocates along the English model. *What You Need to Know About the Proposed Federal Practice Rules*, 65 *A.B.A.J.* 60, 63 (1979) (an interview with Judge Devitt).

sion, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. . . .

[A]t present it can be said with confidence in this country that where there is any doubt the vast majority of counsel put their public duty before the apparent interests of their clients. Otherwise there would not be that implicit trust between the Bench and the Bar which does so much to promote the smooth and speedy conduct of the administration of justice. . . .<sup>8</sup>

My impression is that barristers do view their professional obligations in these terms and are not willing to compromise their duties to the court, the public, or their profession in order to advance their clients' interests. This attitude accounts for the English advocates' generally high reputation for integrity, not only before the Bar but in the public's eye as well.

And these high standards are not without tangible benefits for society. For example, barristers take seriously the ethical prohibition against the prosecution of frivolous litigation. Accordingly, they usually advise against litigation of marginal claims and recommend settlement of closely divided cases. To cite just one year, in 1973 the Queen's Bench Division of the High Court of Justice recorded 56,990 cases which were not disposed of by default or summary judgment, but only 1,087 of these cases proceeded to trial.<sup>9</sup>

The ethical standards which our British cousins observe should be emulated by the American Bar. Our current effort to improve the competency of American litigators must be combined with a new emphasis on the proper objectives and ethics of advocacy, not only because it is the right thing to do, but because it is also the eminently practical thing to do. No single step would do more to relieve the burden of litigation in our courts and to improve the standing of the American Bar with the American public.

ARTHUR E. WILMARTH, JR.

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<sup>8</sup>Rondel v. Worsley, [1969] 1 A.C. 191, 227-28.

<sup>9</sup>Webster, *supra* note 1, at 97-99. The High Court of Justice sits both as a court of first instance and as a court of limited appellate jurisdiction. When sitting as a court of first instance it may be designated as the Queen's Bench Division (which handles trials in tort, contract and other commercial claims), the Chancery Division (which is the court of original equity jurisdiction), or the Family Division. When sitting as a court of appellate jurisdiction it is designated as the Divisional Courts.

